The Art of Trial Advocacy

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Prevention of Juror Ennui—Demonstrative Evidence in the Courtroom

Introduction

You just received the most problematic case of your short career as a trial counsel in the Republic of Korea—not only do you have dull facts and a complicated fact-pattern, you have as your key witness a smarmy co-accused who will testify under a grant of testimonial immunity (oh, joy). The accused, Sergeant Brown, with the assistance of your key witness, Specialist (SPC) Wright, has been spiriting copious quantities of ground beef from the chow hall and black-marketing it "downrange." Brown and Wright were able to carry out their deceit for several months because of their clever manipulation of various Department of the Army (DA) forms.

Early in the case, as you begin to search for a theme, you realize that the real victims in this case are the soldiers in the unit. These soldiers, as a result of the accused's avarice, have been eating adulterated chili-mac for months. You also realize that, though you are committed to winning the case, you face two conundrums: (1) you must disabuse the panel members of the notion that "you can't play with pigs without getting dirty"[1]—in other words, they should give your crook, SPC Wright, credence—and (2) you must breathe life into a fact pattern that is, at first blush, coma-inducing.

Demonstrative Evidence

Upon receipt of case files, new counsel have so many issues with which to concern themselves that they rarely think about demonstrative evidence and how it might fit into their cases. This initial stage, however, is when lawyers should begin brainstorming about what potential pieces of evidence might help illustrate a witness' testimony.

Demonstrative evidence, in most cases, springs from the head of counsel. It has no historical connection to the case and is therefore distinguishable from "real evidence" that, for example, CID agents bring to trial, such as the clothing of the accused, or the cocaine found in the accused's wall-locker. Demonstrative evidence, contrarily, has no probative value in itself; it serves merely as an adjunct to the witness' oral testimony. It is a visual aid to assist the panel members in understanding the other evidence or to make your theory more understandable. Types of demonstrative evidence include models, replicas, diagrams, charts, maps, photographs, videotapes, computer-generated graphics, and in-court demonstrations.

Demonstrative evidence configures numerous different mental images into a singular, tactile reality. It transforms a crook into a pedagogue; a pedantic expert becomes a riveting raconteur. The witness, like a child in "show-and-tell" class, loses his self-consciousness, knowing that his audience is engaged by the descriptive piece of evidence, rather than his own verbal testimony. In addition, demonstrative evidence is important for another reason—it significantly increases juror retention. Panel member boredom visibly dissipates as counsel unveil the evidence. "Fully one-third of the human brain is devoted to vision and visual memory."[2] Clinical studies have demonstrated that people *immediately* forget two-thirds of what they *hear*,[3] but their retention increases an astounding 650% when both visual and oral presentations are used.[4] These statistics validate our common sense understanding that seeing *is* believing.

With the advent of desktop computers and powerful computer software packages, fiscally challenged counsel are no longer restricted to using rudimentary charts. Overhead projectors, though still useful in many circumstances, can be replaced with Powerpoint slides and computer-generated graphics. Counsel who require technicians to prepare the evidence can look to the local installation training support centers (TSC). Such TSCs usually have, as a sub-element, a visual information (VI) activity. The VI activity can prepare maps, diagrams, photographs, and videotapes, as well as enlarge and dry-mount photographs and other exhibits. The VI activity should also have state-of-the-art computer graphics and software programs.[5]

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1. The variant argument goes: "you can't cast a play in hell with angels."

2. Carole E. Powell, *Computer Generated Visual Evidence: Does Daubert Make a Difference?*, 12 GA. ST. U. L. REV. 577, 599 (1996) (quoting Roy Krieger, *Now Showing at a Courtroom Near You . . .*, A.B.A. J., Dec. 1992, at 92).

3. *Id.* at 579.

4. *Id.*

5. Procedurally, the TSC or VI activity will first require you to complete a DA Form 3903-R (VI Work Order), describing the work you need to be performed.

As a practical point, counsel and another person should haul the exhibits to the courtroom before trial and conduct a test run. Plan where evidence should be positioned and make sure the exhibit is large enough for easy viewing. Practice with technical equipment in the courtroom before trial and make sure that it actually works. Carefully select an appropriate sponsoring witness for the exhibit. This should usually be the witness with the most knowledge about the exhibit. Consider whether you will need more than one sponsoring witness (for example, with a to-scale diagram).[6] Call the witness early, so that you can admit the exhibit early. Consider seeking admission of the evidence in an Article 39(a) session before trial, or obtaining a stipulation of fact as to its admissibility. Using the exhibit in opening statement may be extremely persuasive.

During trial, go through the witness' verbal testimony once, fully, then lay the foundation for the exhibit[7] and have the witness "use" the evidence. By using the demonstrative evidence to walk the panel members through the witness' testimony, the witness is effectively testifying twice. Repetition of important points underscores your case theme and the crucial testimony, and it often wins the case. To be truly effective, you must have rehearsed with the witness more than once. In cases where the witness is a co-accused (and your key witness), spend considerable time going over the testimony.

In the vignette above, counsel can turn the potentially deadly witness, SPC Wright, into a credible and articulate teacher. Rather than simply having SPC Wright monotonously describe what he and the accused did, counsel can use an overhead projector and a greasepen and have SPC Wright show the members how he and the accused actually completed the forms. In the process, he will illustrate for the panel *exactly* why he could not have committed the crime alone and how he and the accused masked the missing meat from their technical supervisors for so many months. This low-budget, low-tech presentation is one way to present the evidence. Another way is to scan the forms into Powerpoint and have SPC Wright use a computer writing pen. In addition, counsel may want to offer photographs of the quantities of beef actually stolen. Another option is to haul into court a representative quantity,[8] or a portion of the quantity, of beef the accused stole.[9]

Conclusion

As with almost any other aspect of trial advocacy, successful use of demonstrative evidence depends, in large measure, on the facts and counsel's creativity. Creativity does not mean complication. Employ your innate creativity, not only in your courtroom arguments and interchanges with witnesses, but also in your use of demonstrative evidence. Major Moran.

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6. In a case in which you wish to admit a replica of a knife or a gun, you will need to call two witnesses to make the replica relevant. First, an eyewitness to the crime must describe the weapon actually used. Second, another witness must testify that the accused owned a weapon like the one the eyewitness described. With to-scale diagrams, usually the person who prepared the diagram to-scale should be called, in addition to the witness whose testimony you wish to illustrate.

7. The military judge should admit the evidence as long as it is: (1) relevant and (2) helpful to the factfinder. Be prepared to make or to answer a hearsay objection, a relevancy objection, or an objection under Military Rule or Evidence (MRE) 403. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 403 (1995). The proponent of the evidence should argue that MRE 403 favors admission. *See* United States v. Thomas, 19 C.M.R. 218, 224 (C.M.A. 1955).

8. Not the actual beef stolen, of course.

9. The practical consequences of this I leave to the reader.